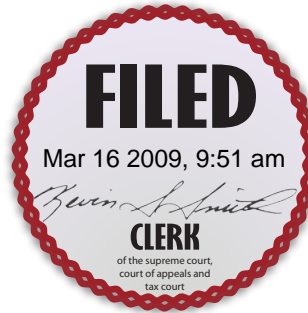


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD A. DOBESKI,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 46A03-0806-CR-331

APPEAL FROM THE LAPORTE CIRCUIT COURT
The Honorable Thomas Alevizos, Judge
Cause No. 46C01-0709-FC-502

March 16, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Richard Dobeski (“Dobeski”) appeals his conviction for Child Molesting, a Class C felony.¹ We affirm.

Issues

Dobeski presents three issues for review:

- I. Whether the trial court abused its discretion by determining that C.T. was competent to testify;
- II. Whether the admission of C.T.’s videotaped statement constituted fundamental error; and
- III. Whether there is sufficient evidence to support Dobeski’s conviction.

Facts and Procedural History

During the summer of 2007, Dobeski lived in a mobile home park in Westville. He befriended C.T., one of the neighborhood children. On one occasion when C.T. was inside Dobeski’s mobile home, Dobeski pulled down C.T.’s clothing and fondled C.T. The State charged Dobeski with Child Molesting and, on April 15, 2008, a jury found him guilty as charged. Dobeski was sentenced to eight years imprisonment. He now appeals.

Discussion and Decision

I. Finding of C.T.’s Competency to Testify

Dobeski contends that the trial court erred by permitting C.T. to testify although seven-year-old C.T. did not demonstrate testimonial competency. Dobeski bases his

¹ Ind. Code § 35-42-4-3(b).

incompetency argument upon C.T.'s initial failure to provide an example of a true statement.

Indiana Evidence Rule 601 provides, "Every person is competent to be a witness except as otherwise provided in these rules or by act of the Indiana General Assembly." Thus, there is no arbitrary line regarding age, and when a child is called to testify at trial, the trial court has the discretion to determine if he or she is competent based on the court's observation of the child's demeanor and responses to questions posed by counsel and the court. Agilera v. State, 862 N.E.2d 298, 303 (Ind. Ct. App. 2007), trans. denied.

A child's competency to testify at trial is established by demonstrating that he or she (1) understands the difference between telling a lie and telling the truth, (2) knows he or she is under a compulsion to tell the truth, and (3) knows what a true statement actually is. Id. at 303-04. The trial court's determination of a witness's competency is reviewable on appeal only for a manifest abuse of discretion. Harrington v. State, 755 N.E.2d 1176, 1181 (Ind. Ct. App. 2001).

Here, when C.T. was initially asked for "an example of something that is the truth," he responded, "I don't know. You got to tell me." (Tr. 32.) However, when provided with specific examples, C.T. was able to demonstrate that he knew the difference between the truth and a lie. He identified as lies the prosecutor's statements that her shirt was blue and that her shirt was yellow. C.T. indicated it was true that the prosecutor's shirt was pink. C.T. later provided his own example of a truth: "I love my dad." (Tr. 35.) As an example of a lie, C.T. offered: "I have a dirt bike, but I don't." (Tr. 35.) When asked if he understood the importance of telling the truth, C.T. responded "Yes" and "Double yes." (Tr. 33.) He also

expressed his belief that he could “get in trouble” if he didn’t tell the truth. (Tr. 35.)

Accordingly, there is evidence from which the trial court could conclude that C.T. understood the difference between telling a lie and the truth, knew he was under a compulsion to tell the truth, and knew what a true statement actually is. Dobeski has demonstrated no abuse of the trial court’s discretion in its determination that C.T. was a competent witness.

II. Admission of C.T.’s Videotaped Statement

Dobeski also alleges error in the trial court’s admission of State’s Exhibit 2, a videotape of C.T.’s statement to police. More specifically, he contends that the trial court erroneously admitted the videotape into evidence absent particularized findings of reliability consistent with Indiana Code Section 35-37-4-6, the Protected Person Statute. Dobeski did not object at trial to State’s Exhibit 2 on this basis, and thus may prevail only if he demonstrates fundamental error.² To constitute fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. Barany v. State, 658 N.E.2d 60, 64 (Ind. 1995).

The Protected Person Statute provides, in pertinent part:

(a) This section applies to a criminal action involving the following offenses where the victim is a protected person under subsection (c)(1) or (c)(2):

(1) Sex crimes (IC 35-42-4).

² In a pre-trial conference, Dobeski’s counsel asserted that Indiana Code Section 35-37-4-6 is “potentially” constitutionally infirm although counsel acknowledged that “so far Appellate Courts have ruled it was constitutional.” (Supp. Tr. 24.) At the time that State’s Exhibit 2 was admitted, counsel lodged a “chain of custody” objection.

* * * * *

(c) As used in this section, “protected person” means:

(1) a child who is less than fourteen (14) years of age;

* * * * *

(d) A statement or videotape that:

(1) is made by a person who at the time of trial is a protected person;

(2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and

(3) is not otherwise admissible in evidence;

is admissible in evidence in a criminal action for an offense listed in subsection (a) or (b) if the requirements of subsection (e) are met.

(e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) or (b) if, after notice to the defendant of a hearing and of the defendant’s right to be present, all of the following conditions are met:

(1) The court finds, in a hearing:

(A) conducted outside the presence of the jury; and

(B) attended by the protected person; that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person:

(A) testifies at the trial[.]

Here, the State and Dobeski agreed that C.T. need not be present at the pre-trial conference regarding the admission of State’s Exhibit 2 because C.T. had already been deposed by defense counsel. It was further agreed upon that the trial court would listen to

C.T.'s in-court testimony and then make a determination as to the reliability of the prior videotaped statement. After C.T.'s in-court testimony, the trial court admitted State's Exhibit 2 into evidence, thus implicitly finding the exhibit had sufficient indications of reliability while not expressly stating such.

Notwithstanding the trial court's failure to expressly state that the "time, content, and circumstances of the videotape provide sufficient indications of reliability," Indiana Code Section 35-37-4-6(e)(1)(B), the videotaped statement was cumulative of C.T.'s trial testimony and its admission does not rise to the level of fundamental error. See Weis v. State, 825 N.E.2d 896, 903 (Ind. Ct. App. 2005) (holding that the admission of a recorded statement under the Protected Person Statute was not fundamental error where it was cumulative of trial testimony).

III. Sufficiency of the Evidence

Finally, Dobeski alleges that there is insufficient evidence to support his conviction for Child Molesting. More specifically, he claims that the State failed to prove that he intended to satisfy sexual desires.

In order to convict Dobeski of Child Molesting, as a Class C felony, as charged, the State was required to show that Dobeski knowingly or intentionally touched C.T., a child under age fourteen, with the intent to arouse or satisfy the sexual desires of Dobeski or C.T. See Ind. Code § 35-42-4-3(b); App. 10.

When reviewing the sufficiency of the evidence to support a conviction, we will consider only the probative evidence and reasonable inferences supporting the verdict. Drane

v. State, 867 N.E.2d 144, 146 (Ind. 2007). In so doing, we will not assess witness credibility and we will not weigh the evidence. Id. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id. The intent to arouse or satisfy the sexual desires of the child or the adult may be established by circumstantial evidence and may be inferred “from the actor’s conduct and the natural and usual sequence to which such conduct usually points.” Nuerge v. State, 677 N.E.2d 1043, 1048 (Ind. Ct. App. 1997), trans. denied.

C.T. testified that Dobeski pulled down C.T.’s shorts “half-way off” and “played with my wiener.” (Tr. 46.) C.T. explained that his “wiener” was located “in my middle of my legs” and was also known as “a private.” (Tr. 47-48.) He testified that Dobeski used his hands and continued “for a minute or two.” (Tr. 49.) Accordingly, there is sufficient evidence from which the jury could conclude that Dobeski committed Child Molesting as charged.

Conclusion

Dobeski has demonstrated no abuse of the trial court’s discretion in permitting C.T. to testify; neither has he demonstrated fundamental error in the admission of evidence. Sufficient evidence supports his conviction.

Affirmed.

MATHIAS, J., and BARNES, J., concur.